IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEVEN E. HENRY, a married individual,	)	**No. 27302-4-III**
	)	
Appellant,	)	
	)	**Division Three**
v.	)	
	)	
STATE OF WASHINGTON, Department of Fish and Wildlife,	)	
	)	**UNPUBLISHED OPINION**
Respondent.	)	
	)	

Schultheis, C.J. — Steven Henry sued the Washington State Department of Fish and Wildlife (Department) under Washington's Law Against Discrimination (WLAD), chapter 49.60 RCW, after he was disability separated from his job as a biologist for the Department. The superior court granted the Department's motion for summary judgment dismissal. On appeal, Mr. Henry contends he raised genuine issues of fact regarding whether the Department reasonably accommodated his disability and whether he was qualified to perform the essential functions of his job. We affirm.

FACTS

In 1988, Mr. Henry started working for the Department as a biologist. The Department assigned him to work in Walla Walla County, primarily in upland wildlife restoration. His work involved a substantial amount of physical outdoor work and hazardous job duties, including the maintenance and operation of heavy equipment, the use of all-terrain vehicles and snowmobiles, and the use of explosives. In 2003, due to a reduction in force, Mr. Henry's primary work station was relocated to Clarkston, Washington, 98 miles from his former duty station in Walla Walla. Mr. Henry continued to live in Walla Walla.

On April 18, 2004, Mr. Henry was diagnosed with Fabry's disease, a rare and physically debilitating hereditary disorder caused by enzyme deficiencies that affect the kidney and other organs. One of the symptoms of the disease is peripheral pain in the extremities that is exacerbated by physical exertion, fatigue, changes in temperature, and stress. This pain can develop into excruciating pain called a "pain crisis," which is generally nonresponsive to treatment. Clerk's Papers (CP) at 57. Mr. Henry's symptoms included chronic neurological pain, pain crises, and debilitating headaches.

On July 12, Mr. Henry started a regimen of bimonthly intravenous enzyme infusions in a hospital. Following these treatments, Mr. Henry was physically ill, often confined to bed for at least two days, and unable to travel, including driving himself home from the hospital. He described the treatments as having Drano shot into his veins.

Mr. Henry will need these treatments for the rest of his life.

On August 25, Mr. Henry's treating physician, Dr. C. Ronald Scott, requested that Mr. Henry be placed on a three-month medical leave effective September 7. At that time, Mr. Henry was experiencing severe pain crises on a daily basis. This request was followed by a family medical leave application on September 15. In Dr. Scott's opinion, Mr. Henry was incapable of performing work of any kind. Mr. Henry's leave was granted and continued for the next year. The last medical update on September 14, 2005, stated that Mr. Henry's prognosis remained undetermined.

After receiving the September 2005 update, Margaret Gordon, a reasonable accommodation coordinator for the Department, sent Mr. Henry a letter advising him that due to his extended absence, the Department needed to assess his work status and engage in a reasonable accommodation process. She enclosed a reasonable accommodation form for that purpose.

On October 6, Mr. Henry submitted a reasonable accommodation form, stating:

> As the disease is chronic and the symptoms are diverse and life threatening, most major life activities are substantially limited by the disability. This includes: the ability to work whenever and wherever I need to; the ability to travel over long distances or for substantial periods of time; the ability to leave home; the ability to perform certain manual tasks and operate equipment; and the ability to walk over long distances.

CP at 77.

His 2004 Biologist 2 Classification Questionnaire (CQ) indicated that 26 percent of Mr. Henry's work consisted of hazardous duties. It stated:

> I perform various hazardous risk job duties necessary for implementation of the programs such as: farming equipment operation, farming implements and attachments (i.e. flail and rotary mowers, earth rotary tillers/ cultivators/plows, cultivation disks/harrows, restoration grass seeding drills and broadcasters, tractor front-end bucket loaders, tractor back-hoe bucket units, ground mulch fabric laying machines, mechanical tree/shrub transplanting machines, earth packers –wheel/drum/spike tooth, augering post hole and tree planting augers, etc.), and their operation and maintenance; heavy equipment operation (i.e. 1/2 ton up to 2 1/2 ton, two and 4-wheel drive trucks up to 26,000 GVW and both two and 4-wheel drivetractors up to 85 horsepower); the use of 4-wheeler ATV's (all terrain vehicles), and opportunities to use snowmobiles, horses, boats, etc. . . . I am trained and licensed in the handling, use, transportation, and storage of explosives for habitat program activities in wildlife capture, and habitat restoration projects/enhancements.

CP at 50.

Mr. Henry then identified the following essential functions of his job that he could not perform without accommodation:

> I am unable to continue to perform certain habitat restoration activities and to operate equipment used in habitat restoration activities including trucks, tractors, farm implements, spray equipment, seeders, etc. I am unable to perform site evaluations to determine needs and practices necessary to meet habitat objectives. I am unable to continue to perform hazardous risk job duties.

CP at 77.

Mr. Henry requested the following accommodations to enable him to perform the

essential functions of his job: (1) designate his home in Walla Walla as his official duty station, (2) allow him to work flexible hours until fully able to return to the workplace, (3) allow communication with his supervisor from home via e-mail, (4) reimburse him for travel expenses, (5) waive the requirement of operating equipment or performing hazardous job duties, and (6) revise his geographical responsibility to include only Walla Walla County.

Upon review of Mr. Henry's request, Ms. Gordon determined that such accommodations were untenable because they removed the essential functions of Mr. Henry's job. She discussed the matter with Karol Rogers, a senior human resources manager, and with Dave Brittell, the Department's assistant director and appointing authority for the wildlife program. Both agreed that hazardous duties were an essential component of Mr. Henry's work. After investigating other positions for Mr. Henry, Ms. Gordon concluded that disability separation was the only option. By letter dated November 22, 2005, Mr. Brittell informed Mr. Henry that he was being disability separated from the Department effective December 9, 2005.

In April 2006, Mr. Henry applied for social security disability benefits. In the application, Dr. Scott described Mr. Henry's present complaints as "chronic neuromuscular pain (unresponsive to medication), chronic fatigue, headache, inability to perspire / tolerate heat or cold / or regulate body temperature, GI complications post-

treatment every two weeks." CP at 89. Dr. Scott certified that Mr. Henry was "[t]otally incapacitated for further performance of duty" and that his return to duty "cannot be determined at this time." CP at 90. The form specified that "totally incapacitated" "means total inability to perform the duties of a member's employment or office or any other work for which the member is qualified by training or experience." CP at 90. In July 2006, Mr. Henry began receiving social security disability benefits.

On June 13, 2006, Mr. Henry filed a lawsuit against the Department, alleging it violated WLAD by failing to reasonably accommodate his disability and wrongfully terminating his employment. On April 14, 2008, the Department moved for summary judgment, arguing that Mr. Henry's medical condition coupled with his inability to operate equipment or perform hazardous job duties rendered him unable to perform the essential functions of his job. Mr. Henry responded that determinations about which job duties are "essential" and what are reasonable accommodations are questions of fact that should be decided at trial. CP at 202.

In support of its motion, the Department submitted an affidavit from Ms. Rogers, which stated:

> A necessary and essential function of habitat management activities includes performing various hazardous risk job duties necessary for implementation of the programs, such as operating and maintaining farming equipment, farming implements and attachments, heavy equipment operation . . ., the use of 4-wheeler ATV's (all terrain vehicles). In addition, hazardous work included the use of explosives for wildlife

> capture, such as turkey trapping, habitat restoration, and projects, such as pond developments.

CP at 37.

Ms. Rogers also stated that a "critical component" of Mr. Henry's work was a physical presence in Asotin and Garfield counties, noting Mr. Henry's "request to change his geographic responsibility to include only Walla Walla County and designate his home as his official duty station would render him unable to perform his functions in Asotin and Garfield counties." CP at 36. Ms. Rogers concluded that Mr. Henry's request would change the function, purpose, and geographic location of his position.

Similarly, Mr. Brittell's affidavit indicated that habitat restoration and maintenance activities, including the use of equipment to conduct these activities, were "critical components and the purpose of the Biologist 2 position . . . and if they are not done, then the critical part of this job is not being performed." CP at 42. Like Ms. Rogers, Mr. Brittell concluded that Mr. Henry's request would change the nature, function, purpose, and geographic location of his position.

In her deposition, Ms. Gordon stated that the CQ submitted by Mr. Henry accurately reflected the essential functions of the Biologist 2 position. She also explained that she did not contact Mr. Henry after receiving his request for reasonable accommodations because there was nothing to discuss—it was immediately apparent to

her that the Department could not accommodate Mr. Henry without removing the essential functions of his position.

Dr. Scott stated that Mr. Henry's condition remained unchanged since his diagnosis. He understood from Mr. Henry that his job was primarily an outdoor position, which required a lot of driving to site inspections and the use of heavy equipment. Dr. Scott was told by Mr. Henry that cold temperatures in the field exacerbated his pain. Dr. Scott believed that the operation of the heavy equipment also increased Mr. Henry's peripheral pain. Due to his understanding of Mr. Henry's job duties, Dr. Scott opined that Mr. Henry could not return to work, concluding, "[he is] unable to perform the maximum physical requirements of his job." CP at 150.

Mr. Henry's deposition testimony contradicted the information he provided in his requests for reasonable accommodations and social security disability. He claimed that his hazardous job duties had been reduced from 26 percent to 2 percent after his job was relocated to Clarkston. He explained that the landowners in Garfield and Asotin counties self-maintained the habitat and that his performance of hazardous duties was no longer necessary. He stated that the majority of his work consisted of reviewing contracts and that he could continue to perform his job if the Department accommodated him with flexible hours and a home office.

Mr. Henry did not dispute that his condition and ability to work had not improved

since 2005 or that he could no longer perform hazardous job duties. When asked how he would evaluate sites in Asotin and Garfield counties by working from home, he responded that he would review maps and aerial photographs.

The court granted the Department's motion for summary judgment, finding there were no genuine issues of material fact and dismissed all of Mr. Henry's claims. Mr. Henry appeals.

ANALYSIS

The issue is whether the trial court erred in deciding no material facts existed regarding Mr. Henry's discrimination claim before granting the Department's motion for summary judgment dismissal. Mr. Henry claims there were genuine issues of material fact regarding his ability to perform the essential functions of his job and whether the Department reasonably accommodated his disability.

The purpose of a summary judgment is to avoid a useless trial when there is no genuine issue of any material fact. *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980). In reviewing an order granting summary judgment, this court engages in the same inquiry as the trial court and considers the evidence and the reasonable inferences therefrom in the light most favorable to the nonmoving party. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). Summary judgment is proper when there is no genuine issue of material fact and the

moving party is entitled to judgment as a matter of law. CR 56(c); *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000). A motion for summary judgment "should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

WLAD protects employees from discrimination based on a disability. RCW 49.60.030(1). Under WLAD it is unlawful for an employer to discharge any employee because of the presence of any sensory, mental, or physical disability. RCW 49.60.180(2). Employers must reasonably accommodate a disabled employee who is able to perform the essential functions of the job, unless to do so would impose undue hardship on the employer. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145, 94 P.3d 930 (2004) (citing *Pulcino*, 141 Wn.2d at 639).

To establish a prima facie case of failure to accommodate a disability, an aggrieved employee must show that he (1) had a sensory, mental, or physical abnormality that substantially limited his ability to perform the job; (2) was qualified to perform the essential functions of the job with or without reasonable accommodation, or was qualified to fill vacant positions; (3) gave the employer notice of the disability and its accompanying substantial limitations; and (4) upon notice, the employer failed to reasonably accommodate him. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 532, 70 P.3d

126 (2003). If a plaintiff employee fails to establish a prima facie case of discrimination, the defendant employer is entitled to prompt judgment as a matter of law. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 181, 23 P.3d 440 (2001).

Mr. Henry claims that the trial court erred in concluding that he failed to establish elements (2) and (4). He first argues that he raised a genuine issue of material fact regarding his qualifications to perform the essential functions of the job. He claims that the evidence established that the CQ was outdated, pointing to his deposition testimony that the actual time spent performing hazardous duties was closer to 2 percent rather than the 26 percent cited in the CQ. He also points to his testimony that he could perform the essential functions of his job if the Department allowed him the flexibility to work around his bimonthly treatments.

The term "essential function" is defined as "a job duty that is fundamental, basic, necessary, and indispensable to filling a particular position, as opposed to a marginal duty divorced from the essence or substance of the job." *Davis*, 149 Wn.2d at 533. Washington law does not require an employer to eliminate an essential function of a job to accommodate a disabled employee. *See Pulcino*, 141 Wn.2d at 644; *MacSuga v. Spokane County*, 97 Wn. App. 435, 442, 983 P.2d 1167 (1999). Furthermore, WLAD does not authorize a plaintiff or court to tell an employer how to organize its workforce or structure individual jobs. *Davis*, 149 Wn.2d at 536.

Here, as detailed above, Ms. Gordon, Ms. Rogers, and Mr. Brittell all stated that the operation of heavy equipment and other hazardous duties were essential components of the Biologist 2 position and that granting Mr. Henry's request for accommodations would change the purpose and function of the position. Mr. Henry admitted to Dr. Scott that his work was primarily outdoor work and required a lot of driving and the operation of heavy equipment.

Ms. Gordon stated that Mr. Henry's job description had not changed after his transfer from Walla Walla to Clarkston and that the CQ accurately reflected the essential functions of Mr. Henry's work. Mr. Brittell explained that "the responsibility of defining the essential functions of the job is generally left to the employee's supervisors in conjunction with the human resources personnel." CP at 42. Mr. Henry's supervisor signed the CQ, thus certifying that hazardous duties were essential functions of Mr. Henry's job.

In view of this evidence, Mr. Henry's unsupported claim that hazardous duties no longer comprised a significant portion of his work and therefore were not "essential functions" is not sufficient to rebut the Department's contentions or the court's summary judgment order for the Department. "Issues of material fact cannot be raised by merely claiming contrary facts." *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). A nonmoving party in a summary judgment may not rely on argumentative

assertions that unresolved factual issues remain. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). The person opposing summary judgment must designate *specific facts* establishing a genuine issue of material fact for trial. CR 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-26, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Meyer*, 105 Wn.2d at 852.

If the nonmoving party can offer only a scintilla of evidence, evidence that is "merely colorable" or "not significantly probative," he will not defeat a summary judgment motion. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987). Mr. Henry's bare assertion that hazardous duties comprised 2 percent of his duties in 2004 is insufficient to defeat summary judgment.

Davis is instructive here. The plaintiff in *Davis* was a systems engineer for Microsoft. His job entailed working 60 to 80 hours a week and required extensive travel and weekend work. After the plaintiff was diagnosed with hepatitis C, he asked that his work hours be reduced to no more than 8 hours a day and 40 hours a week. *Davis*, 149 Wn.2d at 535-36. Microsoft provided a temporary accommodation of his condition by removing part of his workload. It then offered him another position with fewer customer demands and a more structured workweek. *Id.* at 528. The plaintiff, however, wanted to maintain his systems engineer position but with a more traditional eight-hour workday. Ultimately, Microsoft offered the plaintiff the option of a six-week paid job search or a

six-month search to find another position in the company. The plaintiff refused both options and his employment at Microsoft ended. The plaintiff sued Microsoft under WLAD, alleging Microsoft had failed to reasonably accommodate his desire to remain a systems engineer.

One of the issues on appeal was whether the plaintiff had established that he could perform the "essential functions" of his job. Microsoft contended that the job required flexibility in responding to customers in numerous time zones and frequent travel, and the unpredictable, extended hours resulting from those obligations. *Id.* at 532. The *Davis* court concluded that the plaintiff was asking the court to redefine for Microsoft its systems engineer position, correctly noting that WLAD does not authorize a plaintiff or court to tell an employer how to organize its workforce or structure individual jobs. *Id.* at 536. Ultimately, the court held that because the plaintiff's disability limited him to a structured workweek of no more than 40 hours per week and 8 hours per day, he could no longer perform the essential functions of his job. *Id.* at 535. The court stated:

> Washington law does not require an employer to eliminate [an essential function]. Requiring elimination of an indispensable task or role would be tantamount to altering the very nature or substance of the job. *Requiring such an alteration would effectively nullify the second element of an employee's prima facie case—proof that he or she "was qualified to perform the essential functions of the job."*

Id. at 534 (emphasis added) (citation omitted) (quoting *Hill*, 144 Wn.2d at 193).

Similarly here, the evidence establishes that Mr. Henry's requested accommodations would require the Department to alter a physically rigorous outdoor job to a desk job that consists of reviewing maps and contracts. Such a change would alter the fundamental nature of the Department's Biologist 2 position. We have no authority to tell the Department how to structure this position. *Id.* at 536.

CONCLUSION

In view of the record, Mr. Henry fails to raise a genuine issue of fact that he could perform the "essential functions" of a Biologist 2. His position requires the performance of hazardous duties and it is undisputed that Mr. Henry can no longer perform such duties. Resolution of this issue disposes of Mr. Henry's reasonable accommodation claim. An employer is not required to reasonably accommodate an employee who is unable to perform the essential functions of the job. *Riehl*, 152 Wn.2d at 145. Because Mr. Henry failed to raise genuine issues of fact that he could perform the "essential functions" of his job or that the Department failed to reasonably accommodate him, the trial court's summary judgment dismissal of the case was proper. Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Schultheis, C.J.

WE CONCUR:

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Sweeney, J.

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Korsmo, J.